

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
)  
Implementation of Section 207 of the ) CS Docket No. 96-83  
Telecommunications Act of 1996 )  
)  
Restrictions on Over-the-Air )  
Reception Devices: Television Broadcast )  
and Multichannel Multipoint Distribution )  
Service )

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**COMMENTS OF BELL ATLANTIC<sup>1</sup>**

The Commission's proposed rules preempting state and local regulations that affect the installation, maintenance, or use of devices designed for reception of multichannel multipoint distribution service ("MMDS") is consistent with the mandate in the Telecommunications Act of 1996.<sup>2</sup> In addition, the rule will promote competition in the video marketplace and protect consumers of new video distribution services from unreasonable local regulation of antennae and other devices designed for such reception. In order to assure that consumers have access to a full range of choices in the delivery of video programming, however, the Commission should clarify certain aspects of its proposed rule.

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<sup>1</sup> These comments are filed on behalf of Bell Atlantic Corporation and Bell Atlantic Video Services Company ("Bell Atlantic").

<sup>2</sup> Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996) (the "Act") §207 ("[T]he Commission shall . . . promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."

**I. The Commission's Proposed Preemption Policy Is Consistent With The Act, Will Increase Access To Wireless Programming Services, And Will Promote Full And Fair Competition Among Different Video Programming Services.**

The 1996 Act requires the Commission to “promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for . . . multichannel multipoint distribution service . . .”<sup>3</sup> “Impair” means “[T]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner; to diminish in quality, value, excellence or strength...”<sup>4</sup> Current state and local regulations and non-governmental restrictions that prohibit the placement of antennae and associated reception devices clearly hinder the ability of consumers to obtain receive video programming services through MMDS. As a result, the Commission’s proposed rules preempting such regulations and restrictions are consistent with the Act.

Moreover, it is not only outright prohibitions on antennae and associated devices that limit consumer access to wireless video services, but also restrictions and regulations -- such as application and review processes -- that impose undue delay on such access. Because these restrictions and regulations also “impair a viewer’s ability to receive [wireless] video programming services,”<sup>5</sup> the Commission’s proposed rule, which preempts any regulation “that *affects* the installation, maintenance, or use of devices . . .”<sup>6</sup> is necessary to give full affect to Congressional intent..

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<sup>3</sup> 1996 Act, §207; Joint Explanatory Statement of the Committee of Conference (“Joint Explanatory Statement”) at 166.

<sup>4</sup> Black’s Law Dictionary (6th ed. 1990)

<sup>5</sup> Telecommunications Act, §207.

<sup>6</sup> NPRM, Appendix A (emphasis added).

The Commission also correctly concludes that its preemption policy should include non-governmental entities such as homeowners' associations, and further concludes that it should accord non-governmental entities less deference than it gives governmental entities.<sup>7</sup>

Restrictions imposed by non-governmental entities are often more onerous than state and local governmental regulations. Moreover, because safety and health concerns can be addressed through local governmental regulations, the Commission's proposed rule preempting non-governmental restrictions and denying them the rebuttal and waiver provisions afforded state and local governmental entities is appropriate.

Nonetheless, some parties have argued that the statute does not reach private, rather than governmental, restrictions. They are wrong. The House Report on H.R. 1555 explained that section 308 (the predecessor to section 207 of the Act) was intended "to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, *or restrictive covenants or encumbrances that prevent the use of antennae . . . or of satellite receivers . . .*"<sup>8</sup> It also explained that "[E]xisting regulations, including but not limited to, zoning laws, ordinances, *restrictive covenants or homeowners' association rules*, shall be unenforceable to the extent [they are] contrary to this section."<sup>9</sup> The italicized examples, of course, are all private restrictions, and this legislative history conclusively shows that Congress did intend to prohibit precisely these types of restrictions.

The Commission's proposed rule, however, uses different language to describe the non-governmental restrictions that are preempted than it uses to describe the state and local

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<sup>7</sup> NPRM, ¶ 10.

<sup>8</sup> H.R. Report No. 204, 104th Cong., 1st Sess. 123-24 (1995) (emphasis added).

<sup>9</sup> *Id.*

regulations that are preempted. The difference introduces needless ambiguity and may invite parties to argue that the scope of the preemption is lesser, when in reality the reach of the statute is identical in both instances. The Commission therefore should revise its proposed rule as follows:

No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it ~~impairs a viewer's ability to receive video programming signals from~~ affects the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service.

Which ever language is chosen, however, the Commission should make clear that restrictions imposing an economic burden or delay on consumers "impair" or "affect" the use of MMDS antennae and are preempted.

Finally, the Commission's tentative conclusion that its rule should not draw distinctions based on antenna size<sup>10</sup> is appropriate. The Act makes no such distinction and neither may the Commission since including a distinction in the Commission's rule would be inconsistent with the Act.<sup>11</sup>

**II. The Commission Should Clarify That It Intends To Apply Its Proposed Preemption Policy To The General Category Of Multipoint Distribution Service ("MDS") And Not Simply To The Narrower Category Of Multichannel Multipoint Distribution Service ("MMDS").**

The Act requires the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for . . . multichannel, multipoint distribution service." MDS operators, sometimes referred to as wireless

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<sup>10</sup> NPRM, ¶ 7.

<sup>11</sup> Telecommunications Act, §207. See Joint Explanatory Statement at 166.

cable operators, use channels defined by the Commission as MMDS,<sup>12</sup> *as well as other channels licensed by the Commission*, to provide commercial video services. These other channels include instructional television fixed service (“ITFS”) channels which are licensed to non-commercial entities and leased by MDS operators to provide additional capacity for commercial wireless cable systems.<sup>13</sup>

Consumers who purchase wireless cable services will use a single antenna to receive programming from their MDS operator, whether provided over MMDS or ITFS channels. Limiting the Commission’s preemption policy to a subset of the MDS channels makes no practical sense -- consumers cannot put up or take down their antennae depending on which channel they are watching. The Commission should, therefore, clarify that its proposed preemption policy would apply to the broad category of MDS, including the use of ITFS channels for the provision of commercial wireless cable services.

The Commission should also clarify that its proposed preemption policy would apply to other categories of multipoint distribution service, including “local” multipoint distribution service (“LMDS”). MMDS is only one wireless “cable” technology. The Commission is currently developing service rules for LMDS,<sup>14</sup> and there may be other technologies in the future. LMDS and other new technologies will compete with a variety of multichannel video service platforms, including cable television, direct broadcast satellite (“DBS”), and MMDS. The

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<sup>12</sup> The Commission defines MMDS as “those multipoint distribution service channels that use the frequency band 2596 MHz to 2644 MHz and associated response channels,” *see* 47 C.F.R., § 21.2, referred to as the E and F channels. Multichannel multipoint distribution service (“MMDS”) is a subset of the more general category of multipoint distribution service (“MDS”). *See* 47 C.F.R., Part 21, Subpart K.

<sup>13</sup> *See* 47 C.F.R., Part 74, Subpart I.

<sup>14</sup> Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 Ghz Frequency Band, to Reallocate the 29.5-30.0 Ghz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, DA 95-2005 (rel. Sept. 29, 1995).

Commission should not treat the new technologies differently, but instead should ensure that LMDS and other new technologies have the same ability to serve the market as does MMDS.<sup>15</sup> Accordingly, Bell Atlantic asks the Commission to clarify that its proposed rules would apply to all types of MDS, including LMDS.

### **Conclusion**

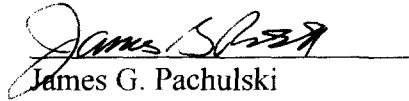
The Commission should adopt its proposed rule, with the modification suggested above, and should clarify that its rule applies to all types of MDS, including LMDS.

Respectfully submitted,

**Bell Atlantic Corporation**  
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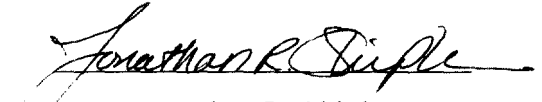
Dated: May 6, 1996

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<sup>15</sup> See Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, *Report and Order, Further Notice of Proposed Rulemaking*, (March 11, 1996) ¶ 60 (“The legislative history indicates that Congress intended for section 207 to apply to almost all providers of wireless video programming . . .”)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing "Comments of Bell Atlantic" was served this 6th day of May, 1996 on the parties on the attached list.

  
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